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IN THE UTAH SUPREME COURT

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CASTLE VALLEY SPECIAL	)	
SERVICE DISTRICT, NORTH	)	
EMERY WATER USERS	)	ANSWER BY BOARD OF OIL, GAS &
ASSOCIATION, and HUNTINGTON-	)	MINING TO RE-HEARING PETITION
CLEVELAND IRRIGATION COMPANY,	)	
	)	
Petitioners,	)	S. Ct. Case Number: 950487
vs.	)	
	)	BOGM Cause # ACT/015/025-93B
UTAH BOARD OF OIL, GAS AND	)	
MINING,	)	BOGM Docket # 94-027
	)	
Respondent.	)	Priority No. 14
	)	
C.W. MINING COMPANY d/b/a	)	
CO-OP MINING COMPANY	)	
Intervenor.	)	

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PETITION FOR REVIEW OF ORDERS OF THE  
UTAH BOARD OF OIL, GAS AND MINING

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I. Parties

As requested by the Clerk, the State of Utah's Board of Oil, Gas and Mining (the "Board") hereby answers the Petition for Rehearing jointly filed January 14, 1997 by the Castle Valley Special Service District (the "Service District"), the North Emery Water Users Association (the "Water Association"), and the Huntington-Cleveland Irrigation Company (the "Irrigation Company"). The Service District, the Water Company and the Irrigation Company are collectively referred to herein as the "Water Users." The intervenor, C.W. Mining Company dba Co-Op Mining Co, will be referred to herein as the Mining Company.

II. Background

On December 31, 1996, the Supreme Court issued a unanimous decision in this matter, in which the Court affirmed a ruling issued in a formal adjudication by the Board. The Water Users thereby lost in their challenge to a decision by the Board to approve a significant permit revision at the Bear Canyon Mine in Emery County. The facts and the law concerning the Water Users' challenge are set forth in detail in Justice Stewart's well-reasoned decision.

III. The Legal Standard Applicable to a Rehearing Petition

The Water Users have filed their petition for rehearing under Rule 35 of the Utah Rules of Appellate Procedure (URAP). Rule 35(a) of URAP requires, in pertinent part, "The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires." Id. (emphasis added).

As discussed below, the Water Users' Petition fails to show that the court was overlooked or misapprehended any pertinent facts or law. The Water Users ask this Court to reconsider two points: (1) the water replacement issue and the (2) due process issue. The Board will respond to each issue in turn.

IV. The Court Properly Decided the Water Replacement Issue

With regard to the water replacement issue, the Water Users reargue their case, but in so doing they fail to show how the Supreme Court "overlooked" or "misapprehended" any pertinent facts or law. In this case, as the Court correctly observed at page 6, paragraph 1 of its decision, the Water Users have not challenged on appeal the Board's finding of fact that the conflicting substantial evidence in the record showed no hydrological connection between the Bear Canyon Mine and the two

springs of concern to the Water Users. The Court's ruling makes clear (see, e.g., page 5 of the ruling) that the federal statute relied upon by the Water Users (30 U.S.C. § 1309a) expressly requires a showing that certain water supplies have "been affected" (past tense) before a legal duty arises on the part of coal operator to replace said water supplies. Given an unchallenged finding on appeal that the water in the two springs had not been affected by mining at the Bear Canyon Mine, it was both logical and appropriate for the Supreme Court to decline the Water Users' request for an order directing the Mining Company to "replace" certain water supplies.

In their Petition for Rehearing, the Water Users contend that the court misapprehended that the "real" issue on appeal is that the Mining Company has failed to identify a "functional replacement source" (see Rehearing Petition at page 1 -3). In making their argument, the Water Users cite to certain water replacement regulations in the Utah Coal Program which apply to surface (or "strip") coal mines, whereas this case involves an underground coal mine.<sup>1</sup>

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<sup>1</sup>That the water replacement regulations applicable to surface or "strip" coal mines do not apply to the underground mine at issue in this case is evidenced by the fact that, since this case was decided December 31, 1996, the Utah Legislature (during the 1997 General Session) enacted water replacement legislation applicable to underground coal mines. See S.B. 12.

The "functional replacement source" argument pressed by the Water Users shows that they, and not the Court, have overlooked or misapprehended the requirements of the law in this case. The "functional" argument raises nothing new. Given the unchallenged facts on appeal, it would make no sense for the Board (or the Supreme Court) to order the Mining Company to show how it will "replace" water which, on this record, has not been affected by underground coal mining activity.

Assuming, arguendo, that the Water Users had met their burden to show that their water supplies had in fact been affected by underground coal mining operations, then perhaps it would be germane to inquire whether the operator tendered replacement water that is "functional," to use the Water Users' terminology. However, since the Water Users failed to show that the springs had been affected by underground coal mining at the Mine, the proposed inquiry regarding the hypothetical "functionality" (or lack of "functionality") of hypothetical replacement water would be a pointless exercise in legal formalism.

V. This Court Properly Decided the Due Process Issue

In essence, the Water Users' contend that they were

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In due course, the Board will have the opportunity to engage in rulemaking under the new statute.

denied due process; they say they received notice that there would be a hearing about Subject A and that the Board, in effect, wildly surprised them by issuing a ruling on Subject A and Subject B. The Water Users further contend that the Court's decision in this matter somehow overrules or at least ignores the teaching of a line of cases which generally hold that it is wrong for an administrative agency to notice up Subject A then make a ruling on Subject B. In this case, of course, Subject A is the hydrologic impact to the springs, if any, from underground coal mining in the Tank Seam and Subject B is the hydrologic impact to the springs, if any, from mining in the Blind Canyon Seam.

The Board offers two responses. First, the notice as given to the Water Users was more than adequate to apprise the Water Users that the Board would hold an evidentiary hearing, and that the hearing would concern the hydrological issues raised by the Water Users themselves. In this case, both Subjects A and B are and were both fairly subsumed under the detailed hydrology regulations of the Utah Coal Program. The Water Users raised a challenge to the Tank Seam permit revision that arose under the provisions of coal law collectively known as the "cumulative hydrologic impact assessment," or CHIA. By definition, CHIA required the Board, as insisted by the Water Users themselves, to

consider not only the hydrological impacts from mining in the Tank Seam (Subject A), but also hydrological impacts from mining in the Blind Canyon Seam (Subject B).<sup>2</sup> If the Board had refused to look at the Big Picture as required by CHIA statutes and regulations, the Water Users would have claimed error.

Second, the Water Users' claim of surprise is untenable. Conspicuously absent from the Water Users' Petition for Rehearing is an acknowledgment that the Water Users' expressly demanded that the Board make factual findings on both Subjects A and B.<sup>3</sup> In its ruling, this Court correctly stated: "The arguments presented by Water Users at the hearing demonstrate that Water Users considered evidence relating to the Blind Canyon Seam to be relevant to the ultimate issue of mining in the Tank seam." December 31, 1996 Ruling at 8.

In short, whatever might be said about an agency that notices Subject A only to make findings about Subject B, there is nothing wrong with an agency fairly noticing Subjects A and B and then holding a hearing about those subjects. Moreover, even if,

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<sup>2</sup>The Utah Coal Program statutes and regulations applicable to the need for the State to make a cumulative hydrological impact assessment (CHIA) are discussed in detail in the Board's Brief.

<sup>3</sup>For detailed citations to the record regarding the Water Users' flip-flop on appeal concerning the proper scope of the hearing, see the Board's April 22, 1996 Brief at pages 31-37.

arguendo, an original notice of hearing only covers Subject A, if a party, once at a hearing, expressly demands that the fact finder make findings about Subject A and B, that party certainly cannot claim on appeal that it was error for the fact finder to do so.

VI. Conclusion

The Water Users' Petition for Rehearing should be denied.

Respectfully submitted this 21st day of April, 1997.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing "ANSWER OF BOARD OF OIL, GAS & MINING TO PETITION FOR REHEARING" to be mailed, postage prepaid, on the 21<sup>st</sup> day of April, 1997, to the following:

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